

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

**TRUSTEES OF CENTRAL LABORERS'  
PENSION, WELFARE & ANNUITY FUNDS,**

**Plaintiff,**

**v.**

**GERALD J. LEPINSKI, JR., individually  
and d/b/a LAKEVIEW CONSTRUCTION,  
LLC,**

**Defendant.**

**Case No. 07-cv-14-DRH**

**ORDER**

**HERNDON, Chief Judge:**

Before the Court is Plaintiff's Motion for Voluntary Dismissal (Doc. 32), in which Plaintiff seeks to dismiss with prejudice its claims in this suit. Although Plaintiff has not expressly indicated in its Motion, such dismissal would be made pursuant to **FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)**, which allows a plaintiff to voluntarily dismiss its claims without a court order if a notice of dismissal is filed "before the opposing party serves either an answer or a motion for summary judgment." **FED. R. CIV. P. 41(a)(1)(i)**.

In this case, the Court recently issued an Order (Doc. 28) setting aside the default judgment entered against Defendant. In so doing, the Court ordered Defendant to file his Answer or other responsive pleading by June 16, 2008. Defendant timely filed a Motion to Dismiss, pursuant to **Rule 12(b)(6)**. Otherwise,

Defendant has not filed an answer or motion for summary judgment nor will the Court construe his Rule 12(b)(6) motion into a motion for summary judgment. **See** *Marques v. Fed. Reserve Bank of Chicago*, 286 F.3d 1014 (7th Cir. 2002) (a plaintiff has an absolute right to voluntarily dismiss suit unless the defendant has already served an answer or motion for summary judgment; moreover, a Rule 12(b)(6) motion should not be construed as a motion for summary judgment unless “the defendant attaches materials outside the complaint . . . and the court ‘actually considers’ some or all of those materials) (citations omitted).

The Court finds that Plaintiff has a right, pursuant to **Rule 41(a)(1)(i)**, to dismiss this suit voluntarily and thus, the Court construes Plaintiff's Motion as a “Notice of Voluntary Dismissal.” As such, Court hereby **ACKNOWLEDGES** Plaintiff's Voluntary Dismissal pursuant to **Rule 41(a)(1)(i)**. Accordingly, this case is hereby **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED.**

Signed this 24th day of June, 2008.

/s/ David R. Herndon  
**Chief Judge**  
**United States District Court**